Nos. 19-2109, 19-2191

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TECNOCAP, LLC

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner,

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC

Intervenor.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR INTERVENOR UNION

Maneesh Sharma

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February 27, 2020

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 19-2109 Caption: Tecnocap, LLC v. NLRB

Pursuant to FRAP 26.1 and Local Rule 26.1,

United Steel, Paper and Forestry, Rubber, Manufactuing, Energy, Allied Industrial & Service Workers
(name of party/amicus)

International Union, AFL-CIO, CLC

who is Intervenor, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/Maneesh Sharma Date: October 21, 2019

Counsel for: Intervenor

CERTIFICATE OF SERVICE

****

I certify that on October 21, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Clifford Spungen
National Labor Relations Board, Region 6
William S. Moorhead Federal Building
1000 Liberty Avenue, Room 904
Pittsburgh, PA 15222

s/Maneesh Sharma
(signature)

October 21, 2019
(date)

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STATEMENT OF JURISDICTION

The National Labor Relation Board (NLRB) had subject matter jurisdiction over this matter under Section 10(a) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(a). The NLRB decision subject to review constitutes a final order. This Court has jurisdiction over Tecnocap, LLC's Petition for Review under Section 10(f) of the NLRA, 29 U.S.C. § 160(f). This Court has jurisdiction over the NLRB's Cross-Application for Enforcement under Section 10(e) of the NLRA, 29 U.S.C. § 160(e). As the NLRA contains no time limits for appeals of NLRB final orders, both Petition and Cross-Application were timely filed.

STATEMENT OF THE ISSUES PRESENTED

Whether substantial evidence in the record supports the NLRB's findings that Petitioner violated Sections 8(a)(3), (5), and (1) of the NLRA when it 1) solicited employees to resign from the Union in order to avoid being locked out by Petitioner, 2) instituted a discriminatory partial lock out of only Union members of the bargaining unit while allowing bargaining unit members who resigned their membership in the Union to work, 3) instituting a partial lockout of Union members in support of a demand that the Union agree to a permissive subject of bargaining, 4) dealt directly with bargaining unit employees by soliciting these employees to enter into individual employment contracts allowing them to work during the

lockout in exchange for resigning their union membership, and 5) unilaterally implemented terms and conditions of employment absent a good-faith impasse.

STATEMENT OF THE CASE

This case is easily resolved with the straightforward application of bedrock principles developed under the National Labor Relations Act ("NLRA" or "Act"). The National Labor Relations Board ("NLRB" or "Board") found that Tecnocap, LLC ("Company") violated well-developed principles of law when it 1) insisted to impasse on, and then partially locked out Union members in support of, its proposal to change the scope of the bargaining unit, a long-recognized permissive subject of bargaining, and 2) solicited Union resignations by threatening to lockout only Union members, and not those employees who resigned their membership in the Union, and then did lockout just the Union membership.[1] In challenging the NLRB's findings, the Company submits a brief so recycled that it challenges findings made by the Administrative Law Judge ("ALJ") that the Board did not even adopt. *See* Co. Br. 20-21.[2] None of the Company's arguments merit consideration. As the Board's findings are substantially supported by the evidence,

[1] The Company petitions for review of the NLRB's additional violation findings. Because Intervenor Union files this brief in support of the NLRB, it will limit its brief to addressing those violation findings related to the legality of the partial lock out. Intervenor endorses and adopts all arguments made by the NLRB on brief, including those that this brief does not address.

[2] "Co. Br." refers to the Company's opening brief. "JA" refers to the Joint Appendix. "SA" refers to the Supplemental Appendix filed by the NLRB.

Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers of America, International Union, AFL-CIO/CLC ("Union" or "USW" or "GMP")[3] urges this Court to deny the Company's Petition for Review, and grant the NLRB's Cross-Application for Enforcement.

I. Board's Findings that the Company Unlawfully Insisted to Impasse on its Permissive Proposal to Change the Scope of the Bargaining Unit, and Unlawfully Locked Out the Union Membership in Support of this Proposal

A. Relevant Facts

Since at least 2006, the Union has represented a bargaining unit of "all hourly related production and maintenance employees, including warehousemen," and excepting, among other classifications, "employees on jobs covered by contracts with other unions." (JA 120, 412). At the time bargaining for a successor agreement began in October 2017, the USW bargaining unit was subject to the terms of a collective bargaining agreement ("GMP CBA") between the Company and Union, effective by its terms from November 29, 2015 through and including November 18, 2017, and voluntarily extended through and including February 28, 2018. (JA 118, 178, 413).

[3] The bargaining unit at Tecnocap was represented by the Glass, Molders, Pottery, Plastics & Allied Workers International Union ("GMP") and its Local 152 until the GMP merged with the USW on January 1, 2018.

Also since at least 2006, the International Association of Machinists and Aerospace Workers Local 818 of District 51 ("IAM") has represented a separate bargaining unit of employees within the Company's facility. (JA 181, 413). The IAM bargaining unit included the job of die setter. (Ibid). At all relevant times, the IAM bargaining unit was subject to the terms of a collective bargaining agreement ("IAM CBA") between the Company and IAM, effective by its terms from April 6, 2015 through and including April 8, 2018. (JA 179, 413).

During the negotiations for the IAM CBA, the IAM and Company agreed that, for the sake of production continuity, die setters could provide lunch and break coverage for GMP-represented production employees, but only in the event that the GMP agreed to such coverage. (JA 253, 413). On March 28, 2016, the Company met with the IAM and GMP to discuss the issue of continuous production, but the parties were not able to reach agreement. (JA 413). Regardless, between March 31, 2016 and May 11, 2016, the Company assigned die setters to provide lunch and break coverage for GMP-represented production employees. (Ibid). Both unions filed grievances in response, and on December 10, 2016, an arbitrator agreed with the IAM that the Company's actions violated the IAM CBA. (JA 414; SA 8-14).

Having failed to secure agreement from both unions to utilize die setters to maintain continuous production through the course of the unions' previous agreements, the Company took the position it would not accept any successor

contract that did not address continuous production through GMP-employee break times. (*See* JA 291 ["the current contract language is unacceptable to the Company as it prevents the operation of lines and continuation of production during break time" and so "simply continu[ing to] work under the old, expired contract is not a feasible solution"]). This was clearly a significant issue for the Company, as it cost the Company an estimated $50,000 per shift to not run production continuously through production-employee breaks. (JA 37). The Company sought to address the issue by negotiating movement of the die setter job from the IAM bargaining unit to the USW bargaining unit. Because the USW contract was set to expire first, the Company began the process in its negotiations with the USW. (JA 118, 414, 292 [March 13 letter from Doty stating that "[n]egotiations with the IAM have no yet commenced"]).

At some point in the negotiations with the USW, the Company provided the USW with descriptions for jobs titled Operator I, Operator II, and Operator III, which are dated October 25, 2017. (JA 255-62, 414). The Operator III job description included many duties performed at the time by IAM-represented die setters. (JA 71-71, 261). On November 9, 2017, the Company proposed to reduce the number of job classifications in the unit to the three Operator I, II, and III job classifications. (JA 414-15). The Company proposed placing all USW-represented employees into either Operator I or II, and placing some employees currently in the

IAM-presented die setter job as well as the die setter duties into the Operator III position. (JA 21-22, 59, 71-72, 75, 78, 101-02, 414-15). "[I]t [was] the Company's intention to move the die setters to Class III Operator" throughout the bargaining. (JA 292, 415). The Union responded to this proposal by explaining that the die setters and their work were under the jurisdiction of the IAM, and the Union could not discuss the Company's proposal to place them into the USW unit. (JA 72).

On November 15, 2017, the parties entered into an agreement to extend the GMP CBA through February 28, 2018. (JA 178). This agreement states that the "Union accepts the three job classes of Operator I, Operator II, and Operator III." (Ibid). However, the agreement further reads, "Negotiations will continue as to red-circling, grandfathering, and who falls in what class." (Ibid). The extension agreement does not reference any agreement regarding the Company's proposed job description for these classifications, and Lisa Wilds, president of USW Local 152M, offered uncontroverted testimony that the Union did not agree to the Company's job descriptions as part of the extension agreement. (JA 78, 98). Thus, the Union agreed to the concept of three job classifications, but the parties did not agree as to what jobs would go into each classification, and did not agree on the placement of the die setter work into Operator III.

Throughout the remainder of the bargaining, the Company maintained its proposal that Operator III was reserved for the die setters and their work. In its

proposals on February 15, 2018[4], February 26, and March 9, the Company continued to propose that the Operator III classification would only include jobs that fit the previously-provided job description. (JA 264, 276, 283). As noted, that job description mostly included duties die setters performed. Additionally, when the Company provided the Union proposed wages for bargaining unit members under its proposed job classifications, it awarded Scott Shimp Operator III wages. (JA 269, 415). Shimp had been a die setter in the IAM unit who was moved back into the USW bargaining unit in lieu of layoff, and performed USW-unit work while in that unit. (JA 24-25, 73-74). The Company proposed that Shimp would be an Operator III because of his die setter training. (JA 74).

Also throughout the bargaining, the Union pushed back on the Company's attempts to bargain over the Union's acceptance of the IAM-represented employees and work. When the Company proposed its job descriptions, Pete Jacks, Executive Officer for the Union, told Darrick Doty, the Company's director of human resources, that the Union did not have jurisdiction over the die setter work, that the IAM did, and the Union could not discuss the matter. (JA 72). On February 28, Jacks handed Doty a written statement of the Union's position on the Operator III classification. In it, the Union states that it

> has repeatedly advised the Company that there is no basis for the parties to bargain over this third job classification which does not belong to the

[4] Further dates will be 2018 unless otherwise stated.

> [Union]. This is an improper subject of bargaining. To the extent that the Company considers this a permissive subject of bargaining you are advised that the [Union] does not wish to bargain on this issue. You appear to believe that the Company can bargain to impasse over this issue. You are incorrect.

(SA 1). Jacks provided this statement because, after repeatedly verbalizing its position through bargaining, the Company continued to propose the shift of the IAM-represented employees and their work into the USW bargaining unit. (JA 101).

On March 14, Jacks sent Doty a letter that read, in part,

> As you know, since the IAM members are not members of our bargaining unit, th[e Company's proposal to move Die Setters to Operator III in the USW unit] is clearly a permissive subject of bargaining and one which we have advised you in the past we are unwilling – and unable – to bargain over in connection with the successor agreement. However, I have also made clear that the [Union] would be willing to negotiate with the Company on all issues relevant to the die setters ***if*** the following occurs in a lawful manner: (1) the Company is able to get the IAM to agree to relinquish jurisdiction over the die setters, (2) the die setters join the [Union] so that we represent their interests; and (3) the Company recognizes the [Union] as the authorized bargaining representative of the die setters.

JA 293 (emphasis in original).

On February 27, Doty sent Jacks an email in which the Company claimed to "register impasse" on three bargaining items, including the Operator I, II, and III job classifications. (JA 274). As mentioned, the Company's proposal from that day included placing the die setters and their work into the Operator III classification. (JA 276). On March 1, the Company declared impasse and implemented certain proposals, including its Operator I, II, and III proposal, with the bargaining unit

members placed in the Operator I or II classification, and the Operator III classification left unfilled. (JA 280, 416). On March 13, the Company locked out the bargaining unit in support of its March 9 bargaining proposal, which included its proposal to place the die setters and their work in the Operator III classification. (JA 283).

B. The Board's Decision

The Board adopted the ALJ's finding that the Company unlawfully insisted to impasse on a permissive subject of bargaining, and then unlawfully locked out the Union members in support of the permissive subject of bargaining. (JA 792).

Importantly, the ALJ found the November 15 extension agreement "made no mention of the die setter position or the job descriptions proposed by [the Company]. Nor was agreement reached as to which jobs would go into which classification, or whether the Operation III classification would be filled by union-represented employees or IAM-represented die setters." (JA 796). The ALJ then found that, because moving die setters into the USW bargaining unit classification was a "change affected (sic) the scope of the Unit regarding who the union represents and into what classifications those employees fall[,]" the Company had insisted to impasse on a permissive subject of bargaining in violation of Section 8(a)(5) of the Act. (JA 802).

The ALJ further found that the Company violated Section 8(a)(5) by "locking out Union members in support of a demand that the Union agree to a contract provision to change the scope of the bargaining unit, a permissive subject of bargaining[.]" (JA 803). In support, the ALJ wrote that "the Respondent's lockout was initiated with the goal of compelling employees' acquiescence with a contract proposal upon which the Respondent had no right, under the Act, to insist." (Ibid). The ALJ went on to explain that the "Board has specifically held that an employer may not lock out employees in order to force a union to accede to demands regarding changes in the scope of a bargaining unit," citing *Greensburg Coca-Cola Bottling Co.*, 311 NLRB 1022 (1993). (Ibid).

II. Board's Finding that the Company Discriminatorily Locked Out the Union Membership While Allowing Non-Union Members of the Bargaining Unit to Work

A. Relevant Facts

As mentioned above, the Company and Union began bargaining for a successor agreement on October 30, 2017. (JA 414). An extension for the then-current agreement ended on February 28. (JA 178, 413). As the parties did not reach a successor agreement by that date, the agreement expired on said date. (*See* JA 414).

On March 5, the Company posted a "Lock-Out Notice GMP Bargaining Unit" in the facilities. (JA 281). This Notice was directed to "GMP Union

Members" and was carbon copied to "Pete Jacks – Executive Officer GMP Council of the USW", "IAM Members", and "Non-Union Member". The Notice, among other statements, read, "We regret to inform that decision is made to exercise the employer lock-out right effective next Tuesday March 13th. Unless notified otherwise, GMP Union members won't be allowed to enter into the property from that date on and until an agreement between the parties is reached." (Ibid, emphasis in original). That same date, Jacks sent a letter to Doty that, in part, warned the Company that it was about to undertake an unlawful lockout. (JA 62). Doty never responded to the Union's assertion regarding the legality of the Company's proposed lockout. (JA 64).

On March 6, Wilds posted an article on the Union bulletin board in the facility regarding lockouts. (JA 66, 90, 539). The Union bulletin board is easily visible to management. (JA 93). The article included several highlighted parts, the most important of which stated that a "lockout must include all employees in the bargaining unit as well as any permanent striker replacements." (JA 92-93, 540). Wilds posted the article because there were rumors in the plant that those who resigned from the Union would be allowed to work during the lockout. (*See* JA 80, 90-91).

The following day, the Company posted another notice that stated, among other things, that the "Lockout applies only to GMP union members. Members of

the IAM, salaried personnel, and others are expected to continue to work." (JA 282, 416).

On March 12, the Company posted another "Lockout Notice." (JA 286, 416). In relevant part, this Notice read

> [A] lockout of the GMP will begin tonight, March 12, 2018, at 11PM. As stated in the Company's earlier posting about Lockouts, The (sic) Lockout applies only to GMP union members. Members of the IAM, salaried personnel, and others are expected to continue to work.
>
> The Company will be hiring temporary employees during the lockout. If you wish to apply for a position, please see Darrick Doty.

(JA 286). Doty posted this notice after USW-represented employees asked him whether they could work during the lockout if they resigned from the Union. (JA 26-27). Three bargaining unit members resigned from the Union on March 12. (JA 404-06).

That same day, the Union sent the Company another letter warning the Company that its proposed lockout would be unlawful. (JA 289). Again, the Company never directly responded to this assertion. (*See* JA 291).

On the night of March 12, the Company began its lockout. (JA 81). Six bargaining unit members had resigned from the Union at this point. (JA 404-08). The Company permitted those employees to work throughout the lockout. (JA 82-83, 296-302, 330-35). During the lockout, each of these employees worked in the positions they held before the lockout; and each continued performing that same

work after the lockout ended. (JA 35). None of these employees were required to fill out new I-9 employment paperwork for their employment during the lockout. (JA 31-32). The Company hired no other temporary employees during the course of the lockout. (JA 27).

On March 13, Union's counsel sent the Company a letter that stated that the Company's lockout was unlawful because it was allowing bargaining unit members who had resigned their USW membership to work, and demanded that the Company either lock out the entire USW bargaining unit or end its unlawful lockout. (JA 295). The letter also requested information related to those bargaining unit members who were allowed to work. (Ibid). In a letter dated March 16, the Company's attorney, Brad Schafer, responded to Union counsel, and confirmed that "individuals that ended their affiliation with the Union… are currently working." (JA 296). Attached to Shafer's letter were forms signed by the six bargaining unit members indicating that the Company was offering them an "at-will" position for the duration of the lockout. (JA 297-302). Shafer's letter in no way addresses the Union's assertions regarding the legality of the lockout.

Once the lockout commenced, Union members attempted to report to work. (JA 82). Security guards only allowed access to employees listed on a form. (JA 34, 82). Union members were not permitted to enter the plant during the lockout. (JA 33). The six bargaining unit members who had resigned their membership

were allowed access to the plant throughout the lockout, including to sign their at-will position forms. (JA 33-34, 82-83).

B. The Board's Decision

The Board adopted the ALJ's findings that the Company's postings and subsequent lockout violated Sections 8(a)(3) and (1) of the Act. (JA 792). The ALJ first found that the Company's bulletin board postings of March 5, 7, and 12, 2018 violated Section 8(a)(1). (JA 802).[5] The ALJ held that, "[b]y providing notice to employees that their ability to continue to work would depend on whether or not they were members of the Union, the Respondent created a situation where employees would feel jeopardized if they did not resign." (Ibid). The ALJ rejected the Company's subjective argument regarding the effect of its conduct, and instead applied the Board's traditional objective test. (Ibid).

The ALJ then found that the lockout violated Section 8(a)(3) because the Company "drew a distinction between employees who performed the same kind of work, were subject to the same CBA, and had the same interest in the contract proposals that led to the lockout – a distinction based entirely on union affiliation." (JA 802). Citing *Schenk Packing Co.*, 301 NLRB 487 (1999), the ALJ held this conduct "discouraged union membership in violation of Section 8(a)(3)." (Ibid).

[5] The ALJ mistakenly listed the dates as May instead of March.

SUMMARY OF ARGUMENT

The Board, with court approval, has long recognized that a proposal to change the scope of a bargaining unit is a permissive subject of bargaining that an employer cannot insist upon to impasse when engaged in collective bargaining, and has also held that a lockout in support of such a proposal is unlawful. There is no doubt that the Company declared impasse based partly on its insistence on the proposal to change the scope of the bargaining unit. There is similarly no dispute that the Company partially locked out the Union members in support of this bargaining proposal. Accordingly, the Board's findings that the Company unlawfully insisted to impasse on its proposal to change the scope of the bargaining unit, and then unlawfully locked out the Union members in support of this permissive bargaining proposal are supported by substantial evidence in the record. The Company's claim that the parties had actually reached agreement on the permissive subject months earlier is without support in the record.

Similarly, Supreme Court, federal appellate court, and Board precedent are all consistent that a lockout of only the Union members of a bargaining unit, as opposed to all employees within a bargaining unit, is discrimination based on anti-union animus. There is no dispute that the Company locked out only Union members, and allowed employees who resigned their membership in the Union to work. Thus, the Board's finding that the Company's lockout was unlawful because

it discriminated against Union activity is supported by substantial evidence in the record.

ARGUMENT

I. Standard of Review

A court's "role in reviewing an NLRB decision is limited." *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011). The court is "bound by the Board's factual findings if they are supported by substantial evidence on the record as a whole." *WXGI Inc. v. NLRB*, 243 F.3d 833, 840 (4th Cir. 2001). This Court "likewise examine[s] the Board's application of the law to the facts to determine whether it is supported by substantial evidence based upon the record as a whole." *Ibid* (quotation marks and citation omitted). "Substantial evidence is more than a scintilla but less than a preponderance of evidence." *Ibid* (quotation marks and citation omitted). The Court "may not displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Gestamp South Carolina, LLC v. NLRB*, 769 F.3d 254, 263 (4th Cir. 2014) (quotation marks and citations omitted).

II. The Company's Partial Lockout in Support of its Permissive Proposal to Change the Scope of the Bargaining Unit Violated Sections 8(a)(5) and (1) of the Act

A. The Company Unlawfully Insisted to Impasse on its Proposal to Move the IAM-represented Die Setters and Their Work to the USW Bargaining Unit, which was a Permissive Subject of Bargaining

Section 8(d) of the Act requires employers and unions "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment[.]" 29 U.S.C. § 158(d). Section 8(a)(5) of the Act makes it an unfair labor practice for employers to "refuse to bargain collectively with the representatives of his employees[.]" 29 U.S.C. § 158(a)(5). "These sections together make it an unfair labor practice for an employer to refuse to bargain in good faith over wages, hours and terms and conditions of employment, and these subjects are considered to be mandatory subjects over which the parties cannot lawfully refuse to bargain." *Universal Sec. Instruments, Inc. v. NLRB*, 649 F.2d 247, 255-56 (4th Cir. 1981) (quotation marks and parentheses omitted). "Bargaining subjects which are not mandatory are permissive and may be bargained over, but a party can also refuse to so bargain." *Ibid*. A party is not permitted to bargain to an impasse on permissive subjects of bargaining. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

"It is well settled that insistence on a change in the scope of the unit certified by the Board violates § 8(a)(5) of the Act." *Newport News Shipbuilding & Dry*

Dock Co. v. NLRB, 602 F.2d 73, 77 (4th Cir. 1979); *see also NLRB v. Southland Cork Co.*, 342 F.2d 702, 706 (4th Cir. 1965) (when "attempting to change the unit for which the union was certified, [employer] violated section 8(a)(5), since the Act required it to accord recognition to the union as representative of all employees in the unit."). This is so because "unit scope is not a mandatory subject of bargaining, [and] a change in unit scope [is] not a matter on which [an employer] c[an] insist to impasse or implement." *United Techs. Corp.*, 292 NLRB 248, 249 fn. 8 (1989), *enfd. NLRB v. United Techs. Corp.*, 884 F.2d 1569 (2d Cir. 1989); *also Boston Edison Co.*, 290 NLRB 549, 553 (1988) ("The scope of an established bargaining unit is a nonmandatory subject of bargaining that either party may propose changing so long as it does not insist on its proposal to impasse."), John E. Higgins, Jr., et al, THE DEVELOPING LABOR LAW 16-124 (7th Ed. 2017) ("As a general rule, it is an unfair labor practice for either party to insist that employees be added to or excluded from a certified unit."). "[N]either party may attempt to force on the other an enlargement, alteration, or merger of an established unit or units. Thus, an employer (or a union) may lawfully insist on confining bargaining within established unit borders." *Boston Edison Co.*, 290 NLRB at 553 fn. 4.

There is no dispute that the Company sought to enlarge the size of the Union's bargaining unit. The parties stipulated that "Respondent [ ] proposed placing some Die Setter employees represented by the IAM and their duties into the

Operator III classification" and that from the beginning of successor bargaining, "Respondent informed the Union it intended to move into the unit represented by the Union some of the duties performed by IAM-represented employees in the Die Setter classification." (JA 414-15; *see also* JA 44 [Shafer: "We wanted to move some of the assignments from one union to another."]). On March 13, Doty wrote that the Union is "fully aware that it is the Company's intention to move the die setters to Class III Operator, something that has been discussed at length in negotiations." (JA 292). Furthermore, the GMP contract specifically excludes any "employees on jobs covered by contracts with other unions[.]" (JA 120). Throughout the course of the parties' successor bargaining, the IAM contract remained in effect, and contained a "Union Recognition" provision that included "Die Setters" in the IAM bargaining unit. (JA 181). During the course of negotiations between the Company and the USW, the Company had not even begun bargaining with the IAM. (*see* JA 292 ["Negotiations with the IAM have not yet commenced as the IAM is presently unavailable"]).

There is also no doubt that the Company insisted to impasse on its proposal to move the die setters and their work to the USW bargaining unit. On February 27, Doty wrote in an email that one of the three "main points" on which it "register[ed] impasse" was its "[t]hree job classification" proposal. (JA 274). On February 28, the Union put in writing what had been expressed a number of times, that it "d[id]

not wish to bargain on the" Company's Operator III proposal. (SA 1). On March 1, the Company posted a notice entitled "GMP Contract – Impasse", in which it announced the implementation of its three job classification proposal. (JA 280). As mentioned above, on March 1, the Company implemented its three job classification proposal. (JA 416).

Accordingly, it is clear that the Company's proposal to create an Operator III classification and to move IAM-represented die setters and their work into that classification was a permissive subject of bargaining over which the Company unlawfully bargained to impasse. *See Newport News Ship Building*, 602 F.2d at 76-77 (finding that employer violated Act when it unlawfully insisted on changing scope of unit from including designers and those who performed design work to draftsmen and those who performed drafting work, as this proposal was a permissive subject of bargaining). The Board, in adopting the ALJ's findings, properly held that the Company's conduct violated Section 8(a)(5) and (1) of the Act.

B. The Company Unlawfully Locked Out the Union Members in Support of its Illegitimate Bargaining Position

"[F]or a lockout to be permissible…, it must be for the sole purpose of bringing economic pressure to bear in support of [the employer's] *legitimate bargaining position*." *Allen Storage and Moving Co., Inc.*, 342 NLRB 501, 501 (2004) (quoting *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965))

(emphasis added). Axiomatically, a lockout is unlawful if the bargaining position it is in support of is not legitimate. *See Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1085 (D.C. Cir. 1991) (employer's final offer that it had unlawfully implemented prior to a lockout "does not qualify as a 'legitimate bargaining position' that the employers may pursue through the use of a lockout"). The Board has specifically held that a lockout in support of an insistence to impasse on a proposal to change the scope of the bargaining unit is unlawful. *Greensburg Coca-Cola Bottling Co. Inc.*, 311 NLRB 1022, 1023-4 (1993), *enf. denied*, *NLRB v. Greensburg Coca-Cola Bottling Co., Inc.*, 40 F.3d 669, 674 (3d Cir. 1994) (denied on basis that record showed the Company was not insisting on a proposal to impasse and through the lockout, but that the issue was a disagreement over the interpretation of current language). Therefore, the Board, in adopting the ALJ's findings, properly held that the Company's lockout in support of its March 9 proposal, which included the unlawfully insisted on permissive subject of bargaining, violated Sections 8(a)(5) and (1). *Id*. at 1022, 1028.

C. The Company's Arguments on Appeal are Meritless

The Company appears to argue on appeal that it did not insist to impasse on a permissive subject, or lockout the Union members in support of a proposal containing a permissive subject, because the Union had actually agreed to accept

the die setters when it signed the agreement to extend the GMP CBA through February 28, 2018. (*See* Co. Br. 10-13).

This argument is a fiction, best demonstrated by the fact that the Company never made it to the ALJ. Its Post-Hearing Brief is devoid of any such argument. Instead, the Company simply argued that it was free to implement its proposals because impasse had been reached. (JA 546). More importantly, no Company witness testified at the hearing that the Company believed the parties had agreed to the movement of the die setters and their work in the extension agreement, even though Local Union President Wilds specifically testified that the parties did not agree to that. (JA 78, 98). The first time the Company raised its argument was on exceptions to the Board.

Regardless, the Company's argument has no merit, as the Board's finding that the parties did not reach agreement on the die setters as part of the November 15 extension agreement is supported by substantial evidence. The extension agreement on its face states, "Negotiations will continue as to red-circling, grandfathering, and who falls in what class." (JA 178). Nothing in the document shows that the parties agreed to the proposed job descriptions, and the job descriptions were not attached to, or referenced in, the agreement. (JA 98, 178). In contrast, the final agreement reached by the parties on March 19, 2018 includes a Memorandum of Understanding Regarding Operator Classification 3. (JA 327).

This Memorandum begins, "The GMP/USW and Tecnocap agree that Operator Classification 3 shall be created under the terms of this Contract. Both parties agree that Operator Classification 3 is where jobs from the other bargaining unit will be placed." (Ibid). Had the parties agreed to transfer the IAM-represented die setters to the USW bargaining unit in the November 15 extension agreement, one would expect to find similar language in that agreement.

Additionally, the Union continued to propose unit positions to place into the Operator III class after the extension agreement was reached, indicating that the parties had not reached agreement on what jobs or duties would fall within Operator III. (*See* SA 4). The Company "[c]ounter"-proposed this proposal by stating, "We do not agree that these jobs fall under these classes. See job descriptions previously provided." (Ibid). The Company did not state that the job descriptions had already been agreed upon, but instead offered the job descriptions as a "[c]ounter" to the Union's proposed distribution of jobs to the agreed-to three classes of jobs.

Lastly, as stated above, Local Union President Wilds specifically testified that the Union agreed to the concept of three classes in the extension agreement, but did not agree to which jobs fell within the classes or to the Company's proposed job descriptions as part of that agreement. (JA 78, 98). The Company's witnesses offered no testimony to contradict or dispute Wilds' account.

Thus, it is clear that the parties agreed only to the concept of three job classifications. They did not agree as to what jobs would go into each classification, and did not agree to the placement of the die setter work into Operator III. The Company's claim to the contrary, based solely on the fact that it had proposed specific job descriptions prior to the signing of the extension agreement, is baseless.

III. The Company's Discriminatory Partial Lockout of Only Union Members Violates Sections 8(a)(3) and (1) of the Act

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). "The statutory language 'discrimination… to… discourage' means that the finding of a violation normally turns on whether the discriminatory conduct was motivated by an antiunion purpose." *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967). Therefore (as noted above), "for a lockout to be permissible…, it must be for the sole purpose of bringing economic pressure to bear in support of [the employer's] legitimate bargaining position," *Allen Storage*, 342 NLRB at 501 (2004) (quoting *American Ship Building Co.*, 380 U.S. at 318), and "is unlawful under the Labor Act… if [it is] motivate[d] by antiunion animus," *Operating Engineers Local 147 v. NLRB*, 294 F.3d 186, 189 (D.C. Cir. 2002). Where locked out employees in a partial lockout "were chosen on

the basis of their Union activities[,]" "the action [is] based upon invalid anti-union motivations." *Local 15, Int'l Broth. of Electrical Workers, AFL-CIO v. NLRB*, 429 F.3d 651, 660 (7th Cir. 2005); *see also Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 701 (1983) (under *Great Dane Trailers*, "discriminat[ion] solely on the basis of union status" is considered "inherently destructive" of rights guaranteed by Section 7 of the Act). "An employer's discriminatory lockout on the basis of protected activity is unlawful even when it is [also] supportive of an employer's bargaining position." *Local 15, Int'l Broth. of Electrical Workers, AFL-CIO v. NLRB*, 429 F.3d at 661.

Concern over discriminatory treatment of Union members during a lockout arises because, under the Act, employees retain the right to resign from a Union at any time. *Pattern Makers' League of N. Amer., AFL-CIO v. NLRB*, 473 U.S. 95, 106 (1985). While these employees are no longer associational members of the Union, they remain members of the bargaining unit whose terms and conditions of employment are subject to collective bargaining between the employer and Union. 29 U.S.C. § 159(a); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). Accordingly, bargaining units may contain Union and non-Union members.

These principles explain why the Supreme Court in *American Ship Building Co.* took care to state that, while as a general matter "use of the lockout does not carry with it any necessary implication the employer acted to discourage union

membership or otherwise discriminate against union members as such," that was *not* the case where there is a credible "claim that the employer locked out only union members, or locked out any employee simply because he was a union member." 380 U.S. at 312. The Board has repeatedly pointed to this language in *American Ship Building Co.* to identify what would render a lockout unlawful. *See, e.g.*, *Harter Equipment, Inc.*, 280 NLRB 597, 598, 600 (1986) (the Board explained the *American Ship Building Co.* Court "rejected the notion that the lockout [in that case] had any natural tendency severely to discourage union membership" as "[t]he lockout did not target only union members[,]" and that informed the Board's later statement that a lawful lockout, including the use of temporary employees, does not violate 8(a)(3) "absent specific proof of antiunion motivation"), *Sargent-Welch Scientific Co.*, 208 NLRB 811, 817 (1974) (discussing *American Ship Building Co.*'s 8(a)(3) analysis, and finding the lockout to be lawful because "the record shows that Respondent was careful to include in the lockout 20 seasonal employees, hired shortly before July 3, who were exempt from the application of the union-security clause, thereby avoiding the appearance of discrimination on account of union membership."). Therefore, where "[t]he *only* distinction between [ ] two groups of employees[, i.e., those locked out and those not,] at the time of the lockout was their participation in Union activities[,]" an employer has "[d]iscriminat[ed] in a way that has a natural tendency to discourage participation in

concerted union activities" and has "violat[ed] section 8(a)(3)." *Local 15, Int'l Broth. of Electrical Workers, AFL-CIO*, 429 F.3d at 661. Specific to the instant case, an employer's "lockout… on the basis of [ ] union membership… [is] motivated by animus toward union members." *Tidewater Construction Corp.*, 341 NLRB 456, 458 (2004).

As the ALJ recognized, the Board's decision in *Schenk Packing Co.*, 301 NLRB 487 (1991), offers significant guidance on these points. There, an employer issued a memorandum that announced the employer would be locking out "all Union employees"; that "no Union members will be employed as replacement"; that the employer would only "use temporary non-union employees as replacement during the lockout"; and "if locked out Union employees become non-union members of the labor market, it is possible for them to be hired temporarily for the duration of the lockout." *Id*. at 488. Ten unit members resigned their union membership and were permitted to work during the employer's partial lockout. *Ibid*.

The Board first determined that the employer's memorandum was an unlawful solicitation to give up union membership. *Id*. at 489. It then turned to the legality of the lockout. Citing the *American Ship Building Co.* language quoted above, the Board noted that "[t]he situation the Supreme Court distinguished in *American Ship Building* is before us in the present case." *Id*. at 490. The Board determined that the facts of the case "clearly establish a clear basis for finding that

discouragement of the unit employees' union membership was a fundamental objective in the [employer's] decision to conduct the… lockout." *Ibid*. The Board rejected the employer's justification for its partial lockout ("to avoid the spoilage of meat") as that reason did not "provide[ ] even a remote justification for a lockout which, in its initial announcement to unit employees, expressly conditioned reinstatement on resignation from union membership." *Ibid*. Ultimately, the Board "concluded… that an unavoidable effect and, hence, unstated purpose of the lockout was to discourage unit employees' membership in the Union by denying employment to those who maintained that status[,]" which "violated 8(a)(3) and (1)." *Ibid*. The Board further indicated a rejection of the employer's scheme of referring to the unit members who resigned their membership in the union and were allowed to work as "temporary replacements," comparing it to *United Chrome Products*, 288 NLRB 1176, 1176 fn. 2 (1988), where the Board concluded "that the employer's lockout of unit employees followed by their rehire as new, probationary employees was a device to implement unlawfully a unilateral change in seniority rights." *Ibid*.

Schenk Packing is directly on point with the instant case. Just as the employer in *Schenk Packing* did through its memorandum, the Company here solicited resignation of union membership to continue working during the lockout through its lockout notices. The March 5 notice is entitled "Lock-Out Notice GMP

Bargaining Unit" but is addressed directly to "GMP *Union Members*," and copied to, among others, "Non-Union *Member*." (emphases added). The reference to "Non-Union Member" must be to non-Union members of the "GMP Bargaining Unit," in contrast to "GMP Union Members." Otherwise, the use of the word "member" would make no sense; the only membership the use of the word could possibly reference is the bargaining unit. Employees outside of a bargaining unit would not be referred to as "member." Therefore, when the notice says "GMP Union members won't be allowed to enter into the property from th[e] date [of the lockout] on," the bargaining unit employees understood that to mean only the "GMP Union members" of the "GMP Bargaining Unit" would be locked out, but not the "Non-Union Member[s]" of the "GMP Bargaining Unit."

Similarly, the Company's clarifying notice of March 7 stated that the "Lockout applies only to GMP union members." Nowhere in the Company's March 7 notice does it state that anyone other than GMP union members would be locked out. This notice was posted a day after Wilds posted and highlighted an article that specifically indicated that, for a lockout to be lawful, the Company would have to lockout the entire bargaining unit. Wilds posted that article in

response to rumors in the plant that employees who resigned from the Union would be allowed to work during the lockout. (JA 92-93).

This reading of the notices is confirmed by the Company's March 12 notice. Leading up to the lockout, Doty testified that he was receiving questions from bargaining unit members about whether they could continue to work if they resigned their memberships in the Union. (JA 26). He ultimately posted the March 12 notice, which states, "The Lockout applies only to GMP union members. Members of the IAM, salaried personnel, and others are expected to continue to work. The Company will be hiring temporary employees during the lockout. If you wish to apply for a position, please see Darrick Doty." This notice explicitly invites unit members to apply for temporary replacement positions, but since "GMP union members" were to be locked out, these temporary replacement positions were conditioned on not being a "GMP union member." This solicitation is almost exactly the same as that made in *Schenk Packing*. And just like in that case, it resulted in several unit members resigning their membership and then being allowed to work during the lockout.

Under *Schenk Packing*, these facts are sufficient to establish a violation of 8(a)(3), unless the Company can offer sufficient justification for its discriminatory partial lockout. It cannot, and does not even try. It is difficult to imagine what justification the Company can offer "for a lockout which, in its initial

announcement to unit employees, expressly conditioned reinstatement on resignation from union membership." *Schenk Packing*, *supra*. There is simply no justification that would allow the Company to draw the dividing line between those locked out and those not at whether or not they are Union members, and the Company makes no attempt to show some other defining characteristic of these six unit members that would justify their selection for work during the lockout. *See Hercules Drawn Steel Corp.*, 352 NLRB 53, 53, fn. 1 (2008), *abrogated by New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010) (selective recall of employees from lockout was not unlawful as employer demonstrated that it could not maintain production during lockout without specific "skilled" employees and "[t]here was also no showing that the Respondent based its selection of employees for recall on their union affiliation or activity."); *Quickway Transportation, Inc.*, 355 NLRB 678 (2010), *affirming and adopting*, 354 NLRB 560, 624 (2009), *originally abrogated by New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010) (lockout of only bargaining unit members who participated in strike unlawful where employer could offer no legitimate justification for discriminatory partial lockout, as two non-striking bargaining unit employees who were allowed to work had "no special skills" "that separated them from the rest of the drivers justifying their recall.").[6]

[6] Tellingly, the Company offers no justification for allowing these six bargaining unit members to work other than, possibly, claiming at the hearing that they "could not afford not to work[.]" (JA 27). This is not a cognizable business justification

Therefore, there is no Company justification that precludes *Schenk Packing* from controlling the determination of this matter.

In addition to cases where a partial lockout was found unlawfully based on union membership (*see, e.g.*, *Schenk Packing*, *supra*; *Tidewater Construction Corp.*, *supra*; *Bunting Bearing Corp.*, 349 NLRB 1070 (2007)), partial lockouts of only those employees who engage in other activity protected by the Act have consistently been held to be unlawful. *See*, *e.g.*, *Allen Storage and Moving Co.*, 342 NLRB at 501 (Board held unlawful lockout where employer allowed the only bargaining unit member who did not participate in a strike to work during a lockout of the former strikers, finding "[s]uch disparate treatment of former strikers is… evidence of discriminatory motive."); *McGwier Co., Inc.*, 204 NLRB 492, 496 (1973) (unlawful partial lockout where "there is an obvious disparate treatment of employees in that the Company locked out only those employees who, by striking, had identified themselves as union adherents, while continue to operate with those employees who had not joined the strike"); *Thrift Drug Co.*, 204 NLRB 41, 43 (1973) (unlawful partial lockout of one employee who picketed trucks entering plant, stating the "*American Ship Building* rule does not give the employer license to pick and choose among its employees and suspend those whose protected…

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that would justify a partial lockout of only Union members. Additionally, Union members who attempted to work during the lockout presumably did so because they also could not afford not to work. (JA 82-83).

activities are most damaging to it. The mere selection of such an employee from among all those in the unit for [lockout] is *per se* discriminatory."); *Quickway Transportation, Inc.*, 354 NLRB at 624 ("Another indicia that… lockout was discriminatorily motivated was [employer's] allowing prestrike bargaining unit employees… who had worked throughout the strike to continue to work after the lockout."); *Local 15, Int'l Broth. of Electrical Workers*, 429 F.3d at 661-2 (finding partial lockout of only former strikers unlawfully discriminatory).

Supreme Court, federal appellate court, and Board precedent are all consistent that a discriminatory partial lockout based solely on union membership, affiliation, or activities violates 8(a)(3) and (1) of the Act. Accordingly, the Board properly adopted the ALJ's findings that the Company's partial lockout of all USW members, but not of members of the bargaining unit who resigned their membership in the USW, violated Section 8(a)(3) and (1), and that the Company solicited bargaining unit members to resign their membership in violation of Section 8(a)(1).

A. The Company's Arguments on Appeal Lack Merit

The Company broadly argues on appeal that it was entitled to hire resigned union members as temporary employees during the lockout. (Co. Br. 16-19). It

entirely bases this argument on its reading of *NLRB v. Martin A. Gleason, Inc.*, 534 F.2d 466 (2d Cir. 1976).

This argument has no merit. The Company makes no real effort to address *Schenk Packing*, which the ALJ recognized as the most applicable case. This is unfortunate for the Company, as *Schenk Packing* again offers guidance. The Board explicitly distinguished the situation at issue in *Schenk Packing* – and therefore in the instant case due to its similarities – from that in *Gleason*, as *Gleason* involved a lockout called by members of a multiemployer bargaining association in response to a whipsaw strike and the inducement to resign from the union occurred subsequent to the initiation of the lockout. 301 NLRB at 490 fn. 5. The Board added that it "has never endorsed the Second Circuit's views expressed in that opinion concerning what an employer lawfully may say or do in the context of a lockout." *Ibid*.

Moreover, *Gleason* does not provide any support for the Company's position. The court in *Gleason* disagreed with the Board about how an employer may respond to employee inquiries regarding working during a lockout. According to the court, the case turned on credibility disputes about whether the employers limited their statements to simply responding to employees' questions by acknowledging that the only potential avenue for employees to work during a lockout was if the employees were to resign their union membership and (as shown

below) their positions with the employer, and did not urge the employees to do so in any way. 534 F.2d at 473-74. The court expressed its view about what an employer may say when it wrote:

> In formulating responses to the inquiries by the employees of returning to work after the lockout had been ordered, the employers had a number of things to consider and they certainly had a right to discuss them with the locked-out employees. They could mention that the employees could not return to their jobs as members of the striking union against whose whipsaw strike the lockout was invoked as a defense, because that was the natural result of a lawful lockout; that in accordance with the decision in the [*NLRB v.*]*Brown*[, 380 U.S. 278 (1965)] case, the employers could only use temporary, nonunion employees to keep the business going during the lockout and that it was *only in the event that its locked-out union employees became nonunion members of the labor marke*t that Gleason could temporarily take them back for the duration of the lockout.
>
> * * *
>
> *Assuming that the employers confined themselves to utterances such as these*, they would be well within their rights. The statements were only a recitation of existing facts in the light of the applicable law; and they could be freely stated by the employer in the *absence of any solicitation of union members to accept nonunion employment or encouragement of workers by the employer to resign from the union*. In other words a decision by an employee to resign from the union and to seek employment must be made independently by the employee and entirely on his own. He may hope to get a job with his old employer but he must be given no assurances that he can have one, if he resigns from the union; nor can the employer give him any inducement to do so.
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> * * *
>
> *We have just described the outer bounds of what an employer can say*, without risking an unfair labor practice. This is where the line must be drawn. *No employer can ask its union employee to resign, or promise him another job if he resigns from the union, or urge, induce, recommend, encourage, persuade or compel him to do so*.

Gleason, 534 F.2d at 476-77 (citations omitted; emphasis added).

The instant situation does not fall within this safe-haven described by the court. In the court's view, an employer would not violate the Act by telling employees that it was locking out the bargaining unit, and that if union members resigned *their positions and union membership*, the employer may be able to hire them temporarily during the lockout. The court clearly intended to limit its analysis to situations where the employees resigned *their positions* as well as their union membership; this is evident by the court's use of phrases such as "nonunion members of the labor market" and "hope to get a job with his *old employer*." *See also, e.g., Gleason*, 534 F.2d at 477 ("Board is of the opinion that… the employer should be prohibited from giving any *former employees* who had resigned from the union, such temporary employment") and 478 (describing resigned employees as "resigned from the Union and *no longer regular employees of Gleason*") (emphases added). In other words, the court simply said that an employer can tell its union employees that, if they quit their jobs and the union during the lockout, the employer can hire them as temporary replacement workers; there is no requirement that the employer refuse to hire these former employees. Additionally, that employer could not say or do anything to "urge, induce, recommend, encourage, persuade or compel" employees to resign from the union.

The court further expressed

> [T]here is now before us the question whether two employers out of 35 who decided to keep their businesses in operation by the use of their union-member locked-out employees, *with the understanding that these employees would resign from the union and return to work for the temporary period of the strike and lockout with the intention that, at the time, they would seek to rejoin the union and return as union-member, permanent employees of the employer*, and with the further understanding that the employer would insist on a no recrimination clause provision in the new contract, then being bargained for with the union, in order that these employees would be able to rejoin the union without being subject to fine or sanctions by the union, violated §§ 8(a)(1) and (3). *It is our opinion that there is nothing in the decision in Brown which gives approval for such a revolving-door means of providing continuous employment for otherwise locked-out union-member employees… [I]f it is found that*, while [the resigned employees] may have taken some risk in resigning from the Union, *they never intended to resign more than temporarily, but to go back to the Union at the end of the lockout*; and, *though they resigned as regular employees from Gleason, they only intended to remain temporary employees during the same period and to return to their regular positions thereafter*, *then [the resigned employees] may have been considered as potential sources of disagreement and discord as lockout breakers and receivers of discriminatory wages while their fellow members of the Union* were either out on the strike against the struck funeral homes or *were out on the street as locked-out union members* of the 13 other associated companies[.]

Id. at 488 (emphasis added).

Thus, the court explicitly rejected the scheme the Company employed in the instant matter. According to the court, an employer does not commit a violation where it does not induce, encourage, recommend, etc. locked out employees to resign their membership and positions to work during a lockout, but simply informs them that if they did resign both, the employer was allowed to hire nonunion temporary labor. It further is not a violation if employees do then resign both membership and position and get work as temporary replacements. However, also

according to the court, if an employer does encourage or solicit employees to resign their membership to take temporary positions during the lockout, through an understanding that the employees would simply return to their regular jobs at the end of the lockout, then the employer has committed a violation.

The Company's actions here fall squarely within the latter category. There is no evidence that the Company ever treated the employees who worked during the lockout as resigned from their positions; the only resignations in the record are resignations from the Union. (JA 404-08). The Company admitted that these employees did not fill out new I-9 employment paperwork for the temporary employment positions. (JA 31-32). Throughout the lockout, these employees worked the same jobs they performed prior to the lockout, and worked those same jobs after the lockout. (JA 35). Also, the Company repeatedly told its employees through its notices that it intended to lock out only the Union members, but that non-union employees would be allowed to work. Its March 12 notice explicitly solicited bargaining unit employees to apply to temporary employee positions. Accordingly, the Company did induce its employees to resign (only) their Union membership in order to work during the lockout. The record evidence clearly supports an inference that these employees were never at risk of not getting a temporary position, and not returning to their regular positions at the conclusion of

the lockout. Therefore, even under the reasoning of *Gleason*, which the Board has never accepted, the Company's actions violate Sections 8(a)(3) and (1) of the Act.

CONCLUSION

As the Board's findings were supported by substantial evidence in the record, Intervenor urges this Court to enforce the Board's Decision and Order, and dismiss the Company's Petition for Review.

Respectfully submitted,

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Dated: February 27, 2020

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This petition complies with the type-volume limitations of Circuit Rule 32 because this petition contains 9,516 words, excluding the parts of the petition exempted by Fed. R. App. P. 28.1(e).

2. This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the petition has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in a 14-point type in a Times New Roman font style.

/s/ *Maneesh Sharma*
Maneesh Sharma

Date: February 27, 2020

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2020, the foregoing Brief for Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Allied-Industrial and Service Workers International Union, AFL-CIO-CLC, was served on all parties or their counsel of record through the CM/ECF system.

/s/ *Maneesh Sharma*